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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 19

CRESCENT AMUSEMENT COMPANY, CUMBERLAND AMUSEMENT COMPANY, LYRIC AMUSEMENT COMPANY, INC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

STATEMENT AS TO JURISDICTION.

GEO. H. ARMISTEAD, JR.,
D. L. LANSDEN,
WILLIAM WALLER,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 54.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRESCENT AMUSEMENT COMPANY, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the defendants, The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Co., Inc., Anthony Sudekum and Kermit C. Stengel, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on May 17, 1943. A petition for appeal was filed on October 28, 1943, and is presented to the District Court herewith.

Jurisdiction.

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is con-

ferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case;

Interstate Circuit v. *United States*, 306 U. S. 208;

United States v. *American Tobacco Co.*, 221 U. S. 106, 188;

United States v. *Reading*, 226 U. S. 324, 373;

United States v. *Delaware Hudson Co.*, 253 U. S. 26, 63-64.

Statutes Involved.

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2):

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Issues and the Rulings Below.

On August 11, 1939, United States of America filed its complaint charging the defendants with violating Sections 1 and 2 of the Sherman Act: (1) by combining with each other and with each of eight distributors to monopolize and unreasonably restrain competition in the exhibition of films in towns in Alabama, Kentucky and Tennessee; (2) by combining separately with the eight distributors as a group to accomplish the same purpose; and, (3) by combining with each other to coerce the distributors with the purpose and effect of monopolizing and unreasonably restraining competition as aforesaid. By an amendment plaintiff voluntarily dismissed the complaint as to five of the eight distributors who had been made defendants, and eliminated the allegation that the distributors had combined among themselves. This left in the case nine alleged conspiracies or combinations, viz., a combination of the defendant exhibitors as a group with each of the eight distributors, and a ninth conspiracy among the exhibitors themselves to coerce the distributors.

The gravamen of plaintiff's case was that independent exhibitors had been excluded from the film market and thus had been excluded from the business of exhibiting motion picture films. Bills of particulars were ordered and plaintiff specified certain independent exhibitors who had thus been excluded. Trial of the case was begun on July 7, 1941, and the taking of evidence was concluded on August 29, 1941. Briefs were filed and oral argument had on December 1, 1941. On March 3, 1943, Judge Elmer Davies, United States District Court Judge, filed findings of fact and conclusions of law. On May 17, 1943, a final decree was entered. Defendants made timely motions to amend the findings of fact and conclusions of law and on August 30, 1943, amended findings and conclusions were filed in which cer-

tain of defendants' motions were granted but the other overruled.

There were findings that defendant exhibitors had acquired certain theatres formerly operated by so-called independent exhibitors but there is no finding that any such independent exhibitor sold out because of a shortage of product. In some instances it was expressly found that the prices charged by the distributors for films were increased when competition entered the town and that this increase in cost of films was one reason for the independent's unwillingness to continue to operate.

The findings contain references to instances referred to as "sell-aways" where a particular distributor licensed its product to an independent exhibitor while the latter had a monopoly in the particular town, and then licensed a later year's product to the defendant exhibitor after the latter entered the town. There are also included in some of these findings quotations from inter-office letters and memoranda, which plaintiff obtained from the files of the five distributors who were voluntarily dismissed as defendants, containing statements that the product was licensed to the defendant in the competitive situation in order to get the business of the defendant in other towns. Defendant objected to these inter-office communications when they were introduced, and after they had been introduced provisionally, moved at the conclusion of plaintiff's evidence in chief to strike them on the ground that they were not competent evidence against defendant exhibitors, and for the further reason that the mere fact that the communications were written and received by officers and employees of the respective distributors was not evidence of the truth of the contents of said communications. In each of the cases of alleged discrimination by a distributor against an independent exhibitor, there was positive evidence from the policymaking officers and employees of the distributors that

the films were licensed to the defendant exhibitor rather than the independent exhibitor because it was better business to do so wholly aside from the question of making a circuit deal for other towns. For example, the independent usually had a very inferior theatre and in many cases was financially irresponsible and did not have a record of complying with prior contract terms.

Appellants make no question on this appeal as to the applicability of the Sherman Act to the business of exhibiting motion pictures. They make the factual defense that there was no evidence of conspiracy, no evidence of coercion, no evidence of discrimination except in the sense of choice of a customer by a distributor for the latter's own justifiable business reasons, and no evidence of exclusion of any independent exhibitor because of a shortage of product. There was no evidence and no contention by plaintiff that any defendant exhibitor had ever licensed any films which were not actually exhibited.

In the final decree of May 17, 1943, defendant exhibitors were enjoined in both paragraphs (8) and (12) from combining closed situations with competitive situations in licensing films. The language of said two paragraphs is different and leaves defendants an indefinite standard of conduct. Although each defendant exhibitor is apparently enjoined from refusing to license pictures from any particular distributor in non-competitive situations unless the distributor also licenses its films to it in competitive situations, the distributors are left free to exercise the corresponding leverage on defendant exhibitors. That is to say, the distributor is left free to say to appellants: Unless you take our pictures for every theatre which you operate, at such and such prices, we will not license you pictures for exhibition in any town where you have competition. Appellants insist that this is unfair and improper and contrary to ordinary principles of equity jurisprudence.

Another issue, involving trade practices, is raised by paragraph (1) of the decree which enjoins defendant exhibitors from "continuing in combination with each other and with each of the distributors, Paramount, Fox and Warner, in making franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them." This language does not specify an ascertainable standard of conduct and it is not clear whether the making of franchises is held to be illegal *per se*, nor is it clear what a franchise is. The word "franchise" has been generally applied to long term as distinguished from short term contracts. It is the contention of appellants that a franchise is not *per se* illegal especially if clearance provisions are subject to readjustment and if such franchises are not in effect at any one time with more than half the distributors currently producing pictures. From the standpoint of an exhibitor, a long term contract may have valid business advantages in that the exhibitor is assured a supply of pictures without having to negotiate at frequent intervals over prices; and the distributor has a corresponding advantage in having an outlet for its pictures. In a rising market such a franchise has a financial advantage to the exhibitor, and in a falling market to the distributor, just as in the case of a long term lease of real estate.

By subsequent paragraphs of the decree each defendant exhibitor is required to divest itself of stock ownership in certain other corporations engaged in the business of operating motion picture theatres in other and non-competitive localities. It is insisted by appellants that this is a harsh and unnecessary provision and under present tax laws may amount to a practical confiscation of their property. Certainly it is not a violation of the Sherman Act for a corporation operating theatres in one part of Tennessee to own stock in a corporation operating theatres in another part of Tennessee.

The Questions Are Substantial.

While appellants raise no question of the applicability of the Sherman Act to the business of exhibiting motion pictures, but expressly pretermit this question, they submit that the questions raised are substantial in that they affect their right and privilege to conduct their business in a lawful and proper manner.

The licensing of motion picture films by exhibitors from distributors is and always has been a matter of horse-trading. The effect of the portions of the decree complained of is to take away from appellants and give to the distributors a very decided advantage in this trading. While the decree may give certain advantages to independent exhibitors as compared with appellants in towns where there is competition, the actual effect is to hurt them both to the advantage of the distributors who are left with full opportunity to play one off against the other. The defensive weapon of the operator of the chain theatre is taken away from him in that he is forced to license films in non-competitive situations without knowing whether these same pictures will be available for his use in competitive situations.

The question of the legality or illegality *per se* of franchises is an important one for the industry. At the present time pictures are being sold by some of the distributors in blocks of five because of a provision in a consent decree signed by these distributors. If this provision should be modified and the distributors should again make long term contracts which contain no illegal clauses or features, appellants should be free to negotiate on this basis. In any event the injunction as to franchises should be clarified so that appellants can know what they may and may not legally do.

The requirement that defendant exhibitors divest themselves of stock ownership in each other (as well as in two

corporations which were not even made defendants) is not, as appellants contend, a suitable or equitable remedy under the facts in this case but amounts to a harsh and unnecessary punishment. Assuming that there are practices in the motion picture industry which should be remedied or corrected, it is submitted that this is not the equitable or proper way to do it.

It is realized that the questions raised are questions which would ordinarily be determined by an intermediate Court rather than by the Supreme Court. However, Congress has seen fit to enact that appeals in cases of this character go direct to the Supreme Court. Under these circumstances, it is submitted that any question which would ordinarily be substantial in an appeal to the Circuit Court of Appeals is necessarily substantial where the only right of appeal is to the Supreme Court.

Possible Defect in Jurisdiction.

Attention of the Court should be called to the following matters:

The final decree was entered on May 17, 1943, and defendants made timely motions to amend the findings and conclusions in a substantial way, viz., the motions if granted in full would have required substantial changes in the decree. Without waiting the action of the Court on these motions, plaintiff prayed for and was allowed an appeal on July 16, 1943. Defendants promptly filed a motion to dismiss the appeal as premature, relying upon the case of *Leishman* v. *Associated Wholesale Electric Co.*, decided February 15, 1943, 318 U. S. —, 87 L. Ed. 495, 63 S. Ct. 543. Thereafter on August 30, 1943, the Court filed amended findings and conclusions but did not modify the decree. Defendants' motion to dismiss the appeal has not been acted upon and has not been abandoned by plaintiff. Under

the circumstances, it is questionable whether the Court had jurisdiction to file amended findings and conclusions.

If the Court lost jurisdiction of the case for the purpose of filing amended findings and conclusions when the Court allowed plaintiff's appeal on July 16, 1943, the present appeal is premature. However, if plaintiff's pending appeal be regarded as void and of no effect whatever, the Court did have jurisdiction to file amended findings and conclusions on August 30, 1943, and this appeal, made within sixty days of said date, is proper.

Respectfully submitted,

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